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**STATE OF MINNESOTA**

OFFICE OF THE ATTORNEY GENERAL

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May 20, 1998

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Magalie Salas  
 Secretary  
 Federal Communications Commission  
 1919 Mary Street, N.W., Room 222  
 Washington, D.C. 20554

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**EX PARTE**

**Re: In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers; Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration**  
 CC Docket No. 94-129

Dear Ms. Salas:

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The Minnesota Office of Attorney General (MN-OAG) joined comments filed in this proceeding as part of the September 12, 1997 Comments of the National Association of Attorneys General (NAAG). The NAAG Comments set forth several principles regarding the enforcement of slamming complaints. One of the key principles was that states should continue to be able to adopt more stringent standards than the Federal Communications Commission ("FCC" or "Commission").

Since the time of the NAAG filing, two events have occurred that highlight the concerns expressed in the NAAG Comments and call for a further discussion of this issue. First, the MN-OAG has recently had its state law slamming claim dismissed in a proceeding in Ramsey County District Court because there was a question that state law may be pre-empted. While it is possible to clear up the ruling on appeal, it has slowed the aggressive enforcement of slamming-- a goal supported by the Commission and Congress, as well as the MN-OAG.

The second event that leads to a further reflection of federal pre-emption issues is the passage of S.1618 authored by Senators McCain and Hollings. S.1618, which passed the Senate unanimously, specifically sets forth the principle in NAAG's Comments that federal law should serve as a floor, or the minimum standards with which carriers must comply and that states should be free to establish more stringent requirements. *See S.1618, Section 101(j)*.

Although S.1618 is not yet law, it is instructive in that it allows states to determine whether there is a need for more stringent laws regarding authorization of changes in subscribers' toll or local carrier and whether different or additional remedies are required. Public policy favors this type of decision. Stripped of its almost cleansing slang, "slamming," the unauthorized change of a subscriber's carrier is typically nothing more than outright fraud. A host of competitive companies,

operating nationally, are subject to the consumer fraud laws of fifty different states. There is no basis to distinguish this form of fraud from any other types of state consumer fraud such as false or deceptive advertising. Nor is the fact that there is a federal role in enforcement sufficient to limit states' traditional police powers in enforcing consumer fraud laws. The Federal Trade Commission (FTC) has worked to enforce laws barring fraudulent business practices without prohibiting states from setting more stringent requirements. This is consistent with the NAAG and MN-OAG view that Section 258 was not intended to pre-empt more stringent state laws or similar state fraud claims such as actions based on deceptive trade practices.

The MN-OAG believes Section 258 of the Telecommunications Act of 1996, evidences a Congressional intent to limit any federal pre-emption of more stringent requirements. Section 258 states, in relevant part, as follows:

(a) Prohibition.

No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such **verification procedures** as the Commission shall prescribe.

47 U.S.C. § 258 (emphasis added). Prior to enactment of § 258, the FCC prescribed verification procedures a carrier must follow. 47 C.F.R. § 64.1100. These rules are not pre-emptive of state requirements. The MN-OAG believes Section 258 does nothing more than assure a minimum standard for verification procedures and that any state could adopt more stringent standards. Any discussion of federal pre-emption in the rules, should clarify this and should draw a bright line limiting the discussion to the issue of verification procedures. It should be made clear that under no circumstances does the Commission intend to consider pre-emption of state laws with respect to penalties, damages and consumer remedies.

There are sound public policy reasons supporting this approach. First, once an unauthorized change has occurred, states are in the best position to determine the appropriate remedy for harmed consumers. States have been at the forefront of the prosecutorial effort to prohibit slamming. While the Commission has recently stepped up its efforts, most customer complaints are handled and resolved on a daily basis through consumer divisions of public utility commissions and state attorneys general. An example of state level determination of remedies is found in Minn. Stat. § 237.66. There, the Minnesota legislature has deemed it appropriate to treat an unauthorized change in service like an unsolicited delivery of goods under its consumer fraud laws. Because the customer must take steps to alleviate a problem the customer did not create, customers are not liable for charges. This approach also creates a deterrent effect for carriers engaged in slamming practices. Clearly, enforcement of remedies by telecommunications carriers, as provided by the 1996 Act, has proven to be an inefficient and unworkable deterrent as carriers will always be subject to a counter-claim for slamming because, like it or not, every carrier has submitted unauthorized change requests.

Another reason for the Commission to clearly state that it is not pre-emptive of any state laws regarding penalties, damages and remedies, is that neither Congress nor the Commission can grant state agencies authority to penalize this conduct. State commissions are creatures of state statutes and their enforcement of these provisions, as contemplated by Section 258, will likely require enabling legislation for the agency to act pursuant to any provisions of federal law. When these state legislatures act, they will do so with an eye to the future, keeping in mind that S.1618 sets a higher floor regarding penalties and remedies than almost any comments received by the Commission. They will also take note of its non-pre-emptive nature and evaluate the level of state mandated penalties and remedies best suited to address problems faced by their state's consumers. Even without S.1618 it is doubtful that state legislators, besieged by consumer complaints, will not desire to address their own remedial scheme. While these enabling statutes will likely vary from the federal rules in some manner, this variation should not be cause for pre-emption of states attempting to enforce state laws prohibiting slamming.

Rather, the Commission should recognize the vital role states play in policing this significant market failure of long distance competition and not adopt rules that weaken state authority by calling into question various state laws that have been or will be adopted pursuant to Section 258 and the Commission's new rules.

The Commission should act to make clear that its rules do not have pre-emptive effect with respect to more stringent state regulation of any aspect of change in a subscriber's carrier. The Commission should recognize that a unanimous vote of the Senate passed a bill that allowed states the freedom to adopt more stringent regulations than embodied in the bill or any Commission rules arising out of the bill. This approach is supported by NAAG and the MN-OAG and is the most effective means of empowering states to continue their efforts in combating slamming activities. Further, the Commission should adopt clear rule language unequivocally preserving the ability of consumers or states, acting on behalf of consumers, to establish more stringent remedies, damages, and penalties in the event of an unauthorized change of provider.

Respectfully submitted,

A handwritten signature in cursive script, reading "Scott Wilensky".

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